ORIGINAL 89-7691

89-7691

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

No. 89 -

DALE ROBERT YATES,

Petitioner,

v.

JAMES AIKEN, Warden, Central Correctional Institution, and THE ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

DAVID I. BRUCK
Attorney at Law

P. O. Box 12249
Columbia, South Carolina 29211
(803) 734-1330

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

I.

DOES SOUTH CAROLINA'S "HARMLESS ERROR" ANALYSIS OF THE SANDSTROM ERRORS IN THIS CASE, IN WHICH THE STATE COURT CONSIDERED NEITHER PETITIONER'S DEFENSE NOR THE JURY'S LIKELY INTERPRETATION OF THE UNCONSTITUTIONAL INSTRUCTIONS, CONFLICT WITH THE REQUIREMENTS OF ROSE v. CLARK AND CARELLA v. CALIFORNIA?

II.

SHOULD THE COURT GRANT CERTIORARI TO ENFORCE ITS TWO PRIOR REMAND ORDERS INSTRUCTING THE SOUTH CAROLINA SUPREME COURT "TO GRANT THE RELIEF WHICH FEDERAL LAW REQUIRES?"

III.

SHOULD THE COURT GRANT CERTIORARI TO CLARIFY THE HARMLESS-ERROR ANALYSIS TO BE EMPLOYED IN CASES INVOLVING BURDEN-SHIFTING MANDATORY PRESUMPTIONS?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES. iii

CITATION TO OPINIONS BELOW. 1

JURISDICTION. 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED. 2

STATEMENT OF THE CASE 3

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW 8

WHY THE WRIT SHOULD BE GRANTED 8

1. The Court should intervene to correct the South Carolina state court majority's persistent refusal to enforce petitioner's constitutional rights in the face of this Court's previous directives 9

2. The state supreme court's harmless-error analysis is plainly erroneous. 11

3. The Court should grant certiorari to determine the appropriate mode of harmless-error analysis in cases involving mandatory rebuttable presumptions of an essential element of the offense charged 15

CONCLUSION 17

APPENDIX

Original opinion of the South Carolina Supreme Court on remand following Yates v. Aiken, 484 U.S. 211 (1988), filed February 6, 1989 . . . . . A-1

Order of the South Carolina Supreme Court denying rehearing, January 29, 1990 . . . . . A-10

Revised opinion of South Carolina Supreme Court issued on petition for rehearing, January 29, 1990 . . . . . A-11

Excerpts from Judge's charge to jury, as reprinted in Joint Appendix, Yates v. Aiken, 484 U.S. 211 (1988) . A-20

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

No. 89 -

DALE ROBERT YATES,

Petitioner,

v.

JAMES AIKEN, Warden, Central Correctional Institution, and THE ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Petitioner Dale Robert Yates prays that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina in this case.

CITATION TO OPINION BELOW

The original and revised opinions of the Supreme Court of South Carolina denying Dale Yates's petition for a writ of habeas corpus on remand from the United States Supreme Court are as yet unreported, and are reprinted in the Appendix to this petition A-1 to A-9. This Court's previous opinion reversing the judgment of the South Carolina Supreme Court is reported as Yates v. Aiken, 484 U.S. 211 (1988). The prior opinion of the South Carolina Supreme Court following summary reversal by this Court is reported as Yates

TABLE OF AUTHORITIES

CASES — Page

Carella v. California, ___ U.S. ___, 109 S.Ct. 2419 (1989) 12, 15, 16

Connecticut v. Johnson, 460 U.S. 73 (1983) 15, 16

County Court of Ulster County v. Allen, 442 U.S. 150 (1979) 10

Francis v. Franklin, 471 U.S. 307 (1985) 3, 4, 9, 10

Rose v. Clark, 478 U.S. 570 (1986) 12, 15, 16

Sandstrom v. Montana, 442 U.S. 510 (1979) 3, 5, 10, 15

State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972) 12

State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983) 3

State v. Peterson, 287 S.C. 244, 335 S.E.2d 800 (1985) . . . 13

State v. Woods, 189 S.C. 281, 1 S.E.2d 190 (1939) 11

State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982), cert. denied, 462 U.S. 1122 (1983) 2, 3

United States v. Hasting, 461 U.S. 499 (1983) 16

Yates v. Aiken, 474 U.S. 896 (1985) 2, 4

Yates v. Aiken, 290 S.C. 232, 349 S.E.2d 84 (1986) . . . passim

Yates v. Aiken, 484 U.S. 211 (1988) . . . . . passim

STATUTES

28 U.S.C. §1257(3) 2

S.C. Code §16-3-10 (1976) 2, 3

v. Aiken, 290 S.C. 232, 349 S.E.2d 84 (1986). This Court's first decision granting the petition for writ of certiorari and remanding to the South Carolina Supreme Court is reported as Yates v. Aiken, 474 U.S. 896 (1985). The initial per curiam order of the South Carolina Supreme Court dated May 23, 1985 denying Yates's petition for habeas corpus is unreported. The opinion of the South Carolina Supreme Court affirming Yates's convictions and death sentence on direct appeal is reported as State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982), cert. denied, 462 U.S. 1122 (1983).

JURISDICTION

The judgment of the South Carolina Supreme Court on remand from the United States Supreme Court was entered on February 6, 1989. A timely petition for rehearing was denied on January 29, 1990. On April 20, 1990, the Chief Justice of the United States, acting in his capacity as Circuit Justice for the Fourth Circuit, entered an order extending the time for filing this petition to and including May 29, 1990. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> "[N]or shall any state deprive any person of life . . . without due process of law . . ."

2. This case also involves S.C. Code §16-3-10 (1976), which provides:

> "Murder" is the killing of any person with malice aforethought, either express or implied.

STATEMENT OF THE CASE

When this case was last here, the Court summarized the facts as follows:

> Petitioner and an accomplice robbed a country store in South Carolina in 1981. After petitioner left the store a fight occurred in which the accomplice and the storekeeper's mother were both killed. Petitioner was convicted of armed robbery and sentenced to death. His conviction and sentence were affirmed by the South Carolina Supreme Court in 1982. State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982), cert. denied, 462 U.S. 1124 (1983).
>
> At his trial, petitioner testified that the decedent had not even entered the store before he left and that he had not intended to kill or to harm anyone. The jury, however, was instructed "that malice is implied or presumed from the use of a deadly weapon." A few months after petitioner's conviction was affirmed, the South Carolina Supreme Court held that it was error to give such an instruction. See State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983). Thereafter, petitioner sought a writ of habeas corpus from the South Carolina Supreme Court, arguing that the burden-shifting instruction given at his trial was unconstitutional under the state court's reasoning in Elmore and under our decision in Sandstrom v. Montana, 442 U.S. 510 (1979). While the application for habeas corpus was pending, we decided another case involving a burden-shifting instruction, Francis v. Franklin, 471 U.S. 307 (1985), and petitioner promptly called that decision to the attention of the state supreme court. The court denied the writ without opinion.

> Petitioner then sought a writ of certiorari in this Court. We summarily vacated the judgment of the South Carolina Supreme Court and remanded the case "for further consideration in light of Francis v. Franklin." Yates v. Aiken, 474 U.S. 896 (1985). On remand the state court determined that the jury instruction at petitioner's trial "suffered from the same infirmities present in Elmore and addressed in Francis v. Franklin." 290 S.C. 232, 234, 349 S.E.2d 84, 85 (1986). Nevertheless, the court held that petitioner was not entitled to relief. As an explanation for its holding, the court stated that its decision in Elmore should not be applied retroactively to invalidate a conviction that was final when Elmore was decided.

Yates v. Aiken, 484 U.S. 211, 212-213 (1988). This Court again granted certiorari and reversed, holding that the state court had erred in denying full retroactive effect to Francis v. Franklin. In doing so, the Court stated that when it previously granted certiorari and remanded petitioner's case for reconsideration in light of Francis v. Franklin, 471 U.S. 307 (1985), Yates v. Aiken, 474 U.S. 896 (1985),

> [o]ur mandate contemplated that the [South Carolina Supreme Court] would consider whether, as a matter of constitutional law, petitioner's conviction could stand in the light of Francis. Since the state court did not decide that question, we shall do so.

484 U.S. at 215. The Court then proceeded to reverse the South Carolina Supreme Court's judgment denying habeas relief, and ordered the state supreme court "to grant the relief that federal law requires." Id., at 218.

On remand, a three-to-two majority of the South Carolina Supreme Court once again denied relief. First, the state court majority asserted that while it was "constrained to accept the high court's mandate that Francis v. Franklin applies here," the state

court interpreted this Court's opinion as meaning that "petitioner would not be eligible in federal habeas corpus proceedings to raise the mandatory presumption issue because counsel did not raise this issue under Sandstrom on direct appeal in state court." Yates v. Aiken, Opinion No. 22962 (S.C., February 6, 1989, amended opinion filed January 29, 1990), infra at Appendix 2 (hereinafter cited as A-2), n. 3. Having thus decreed (despite its own decisions on the merits of the claim) that petitioner was foreclosed from further review as of right in the federal courts, the state court once again denied relief, this time on the ground that the Sandstrom error was harmless. Id., infra at A-2 to A-5.

The state court acknowledged that the trial judge's charge included two separate mandatory presumptions, both of which were erroneous. The first of these was that "malice is presumed or implied by the law from the willful, deliberate and intentional doing of an unlawful act without just cause or excuse." The second was that "malice is presumed or implied from the use of a deadly weapon." A-4, A-14. However, the court went on to assert that because the state prosecuted petitioner on a theory of accomplice liability, his own mental state was irrelevant, and the jury was required only to determine whether petitioner's accomplice Davis had acted with malice when he fatally stabbed the victim. Finding that the jury "would have found it unnecessary to rely on either erroneous mandatory presumption in concluding that Davis acted with malice," A-4, A-14, the court held the unconstitutional instruc-

tions to be harmless.

Justice Toal, joined by Justice Finney, dissented. The dissent expressed doubt that this Court's prior decision authorized the state court to engage in a harmless-error analysis on remand, and concluded in any event that the errors were not harmless. Without disputing the majority's description of South Carolina's law of accomplice liability, Justice Toal pointed out that its application to this case was complicated by the fact that petitioner had set up a defense of withdrawal, and thereby created a substantial factual question as to whether petitioner could be held accountable for Davis' homicidal act under an accomplice liability theory. The dissent continued:

> Despite the majority's contention that one must look at the intent of the killer, not that of the accomplice, the trial judge failed to articulate that the jury must find the killer acted with malicious intent. Thus, the jury could have mistakenly inferred from the confusing instructions that the intent required in order to prove murder was that of Yates because he carried a gun. The unconstitutional instruction which allowed the jury to presume intent, I believe, would have eclipsed Yates' defense of withdrawal, and prejudiced his right to a fair trial.

Yates v. Aiken, Opinion No. 22962 (S.C., filed February 6, 1989) (Toal, J., dissenting), infra at A-8.

Petitioner sought rehearing on two grounds. First, he noted that in stating that it would not "redetermine factual findings supporting the jury's verdict that petitioner is guilty of murder under a theory of accomplice liability," the state court majority had apparently overlooked the reasonable possibility that the jury

may have found it unnecessary to make the factual findings referred to--that the killing of Helen Wood was the natural and probable consequence of the original plan to commit robbery--because the erroneous malice instructions required the jury to presume the element of malice against Yates by virtue of no more than the state's proof that he used a deadly weapon. In addition, he suggested that in stating the facts most favorably to the state, and thereby omitting such evidence as Yates' testimony surrounding the shooting of Willie Wood and his insistence that the robbery plan contemplated nonviolent withdrawal in the event of any resistance, see Yates v. Aiken, 484 U.S. 211, 212 (1988), the state court majority opinion may have improperly failed to indulge the reasonable possibility that the jury might have credited the defendant's version of events. Yates v. Aiken, Petition for Rehearing at 1-2 (filed S.C. Sup. Ct., February 16, 1989).

After considering this petition for nearly a year, the state court denied rehearing by another three-to-two vote. Infra at A-10. The majority did make one substantial change in its opinion, however. Where the original opinion has stated that "[i]n the context of accomplice liability for murder, the element of malice which must be proved is that of the killer," A-4 (emphasis in original), the amended opinion substituted for this sentence the words, "[O]n the facts of this case, as charged by the trial judge, the element of malice relied on by the state is that of the killer, Henry Davis." Yates v. Aiken, supra, infra at A-14. The majority

opinion did not quote or cite any portion of the trial judge's charge in support of this assertion. Nor did the court discuss or even acknowledge petitioner's argument that the state had urged as an alternative theory of petitioner's guilt that he had specifically intended the murder of Mrs. Wood from before the time that he entered the store, and that the jury might have employed the burden-shifting presumptions in order to convict on this alternative theory of petitioner's guilt.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

As noted above and in this Court's prior opinion, the underlying Sandstrom issue in this case was first raised in state post-conviction proceedings in the South Carolina Supreme Court, and was addressed on the merits by that court in Yates v. Aiken, 290 S.C. 232, 349 S.E.2d 84 (1986). Yates v. Aiken, 484 U.S. 211, 213, 217-18 (1988). The question of whether the unconstitutional burden-shifting jury instructions given by the trial judge could be disregarded as harmless was addressed and decided by the South Carolina Supreme Court in its most recent opinion on remand from this Court.

WHY THE WRIT SHOULD BE GRANTED

Ever since January 14, 1985, when he initiated this proceeding in the South Carolina Supreme Court, petitioner has sought to have that court grant him the relief which the federal constitutional plainly entitles him. The state court first denied relief without opinion. Then, presented with an order of this Court intended to

have the state court determine "whether, as a matter of federal law, petitioner's conviction could stand in the light of Francis," Yates v. Aiken, 484 U.S. 211, 215 (1988) the South Carolina court instead announced that the principles applied in Francis were not to be given retroactive effect, and again denied relief. Yates v. Aiken, 290 S.C. 232, 349 S.E.2d 84 (1986). This Court unanimously reversed. Yates v. Aiken, 484 U.S. 211 (1988). On remand, a three-to-two state court majority denied relief yet again, this time adopting a harmless-error analysis which respondents had pressed before it on two prior occasions,[1] but which the state court had previously failed to so much as acknowledge, much less accept.

Petitioner will concede that under normal circumstances, a state court's harmless-error determination would not call for the exercise of this Court certiorari jurisdiction. But there are special reasons why certiorari should be granted here.

1. The Court should intervene to correct the South Carolina state court majority's persistent refusal to enforce petitioner's constitutional rights in the face of this Court's previous directives.

The first reason warranting review is the extraordinary lengths to which the state court majority has gone, in the face of

---

[1]Both in their initial response to the state habeas petition in this case, filed on February 14, 1985, and in its brief filed on February 19, 1986 in the South Carolina Supreme Court following this Court's first remand order, Yates v. Aiken, 474 U.S. 896 (1985), respondents argued that any constitutional error in the presumptions of malice charged by the trial judge were harmless beyond a reasonable doubt.

two successive remand orders by this Court, to avoid granting the relief to which petitioner is plainly entitled under the Due Process Clause of the Fourteenth Amendment. Each time this Court has remanded petitioner's case, the state court majority has identified a different state law ground for denying relief. First, the state court discovered an illusory issue concerning the retroactivity of its own decisions implementing Sandstrom v. Montana, and declined to implement this Court's order requiring reconsideration in light of Francis v. Franklin on that basis. Now, its judgment having been again reversed, the state court characterizes its denial of relief as based on substantive South Carolina law governing accomplice liability. In doing so, the state court majority has employed an impermissibly expansive version of harmless-error review, while ignoring all of the record evidence showing the prejudicial effect of the unconstitutional instructions.

It is significant that the state court reached its harmless-error conclusion after first announcing that its disposition of petitioner's Sandstrom claim was immune from federal habeas corpus review. While this attempt to limit the reach of federal habeas review is plainly wrong as a matter of federal law, County Court of Ulster County v. Allen, 442 U.S. 140, 147-154 (1979), the state court's statement is significant for the hostility which it reveals toward federal enforcement of petitioner's federal constitutional rights. This hostility may have motivated the state court majority

to adopt yet again a logically and factually meritless basis for denying the relief to which petitioner is entitled. Under these circumstances, the fact that the majority once again describes its ruling as simply an application of South Carolina law should no more insulate the state court's holding from review by this Court than it did when this case was last here.

2. The state supreme court's harmless-error analysis is plainly erroneous.

The basis of the state court's most recent holding is its assertion that petitioner was convicted of murder under South Carolina's law of parties, which holds each participant in a dangerous felony liable as a principal for all of the foreseeable consequences of that felony. State v. Woods, 189 S.C. 281, 1 S.E.2d 190 (1939). According to the state court, the prosecution was required to do no more than prove petitioner's intent to participate in the robbery of the victim's store in order to convict him as her murderer, so long as the malicious intent of the actual killer, Davis, was also established.

This argument overlooks the issues created both by petitioner's defense and by the prosecution's theory of the case. It was petitioner's contention that he had abandoned the robbery prior to Mrs. Wood's arrival on the scene, that he had communicated this abandonment to his accomplice, that he never saw Mrs. Wood at the scene, and that he was not legally responsible for her death. Tr. 1092-1099. Petitioner further testified that prior to entering the

victim's store, he and Davis had planned to abandon the robbery and flee the scene without harming anyone if the proprietor refused to give them the money. Tr. 1084-1085. Petitioner did admit to superficially wounding the victim's son, Willie Wood, after Mr. Wood appeared to reach for a gun under the counter. Tr. 1097-1098. But petitioner then ran from the store while urging Davis to do the same. The evidence thus permitted the jury to conclude that Davis' action in killing Mrs. Wood was sufficiently far removed from the original conspiracy to commit robbery, and that petitioner had sufficiently abandoned that conspiracy prior to Mrs. Wood's arrival on the scene, so as to free petitioner from liability under the law of parties.

Petitioner recognizes, of course, that the jury could have convicted him under an accomplice liability theory. State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972). But in order to establish harmlessness under even the most flexible application of the harmless error doctrine, compare Rose v. Clark, 478 U.S. 570, 579, 583 (1986), with Carella v. California, ___ U.S. ___, 109 S.Ct. 2419, 2421-24 (1989) (Scalia, J., concurring), respondents must show more than this: they must establish that the jury had no rational alternative but to convict in the absence of the presumption. And here, such a claim conflicts with both the evidence and South Carolina law. South Carolina's law of accomplice liability is inapplicable unless the jury finds that a homicide was the probable result of the acts actually agreed upon by the co-

conspirators. State v. Peterson, 287 S.C. 244, 247, 335 S.E.2d 800, 801-802 (1985). Thus the nature and scope of the prior felonious agreement, and the extent to which the parties were acting in accord with the agreement when the killing occurred, are questions of fact which must be determined by the jury on the basis of the evidence presented. In this case, the jury could have been left with a reasonable doubt as to petitioner's guilt under accomplice liability principles, considering both the prior agreement to retreat without using force, and petitioner's effort to flee the scene and to urge his accomplice to do likewise prior to the victim's arrival in the store. However, these facts were effectively neutralized by the trial judge's instruction that "malice is presumed or implied from the use of a deadly weapon." For this reason, the unconstitutional jury instructions could not have been disregarded as harmless even had the accomplice liability theory now stressed by respondents been the only theory under which petitioner was prosecuted.[2]

This leads to the second reason why the constitutional errors in the court's instructions cannot be disregarded as harmless. Although the state court's opinion includes no acknowledgement of this fact, the record plainly reveals that the prosecution employed

---

[2]In this connection, the state court opinion ignores the fact that the trial judge never specified whose deadly weapon he was referring to when he instructed the jury to presume malice from its use. The state court majority seems to have decided this case on the unwarranted assumption that the jury would have understood this instruction to refer only to the knife wielded by Davis, and not to the gun which petitioner used during the robbery.

an alternative theory of liability in persuading the jury to convict petitioner of Mrs. Wood's murder. Faced with the possibility that the jury would accept petitioner's testimony and reject the state's case for murder under a theory of vicarious liability, the prosecutor asserted as an alternative theory at trial that petitioner and Davis had actually intended from the outset to kill any witnesses to the robbery, including Mrs. Wood. Tr. 1172-1176. This argument, which was based on circumstantial evidence,[3] sought to convict petitioner by establishing his own malicious intent in the actual killing of Mrs. Wood. While it is unlikely that the jury would have accepted this assertion by the state simply on the strength of the evidence presented, the prosecution's burden was substantially lightened by the trial judge's instructions on the presumptions of malice arising from the doing of an unlawful act and from the use of a deadly weapon. The reason for this is that the presumptions could reasonably have been interpreted as directing the jury to find that petitioner entertained actual malice in the murder of Mrs. Wood, under the state's intent-to-kill theory, solely on the basis of evidence that he employed a deadly weapon and that he had intentionally committed an unlawful act--robbery--prior to the killing. Since the evidence was obviously

---

[3]The prosecutor stressed that the robbers did not conceal their identity, and asserted that Davis' use of a knife in the robbery, and his order to Willie Wood to bend over the counter, showed both robbers' pre-existing plan to commit murder without creating any noise or attracting attention. The prosecutor also argued that petitioner and Davis probably saw Mrs. Wood outside the store just before the robbery. Tr. 1172.

not "so dispositive of [petitioner's] intent that the jury would have found it unnecessary to reply on the presumption," Connecticut v. Johnson, 460 U.S. 73, 97 n. 5 (1983) (Powell, J., dissenting), the state court majority's harmless error determination is flawed, and should be reversed. Rose v. Clark, 478 U.S. 570, 583-84 (1986).

3. The Court should grant certiorari to determine the appropriate mode of harmless-error analysis in cases involving mandatory rebuttable presumptions of an essential element of the offense charged.

In the foregoing discussion of the South Carolina Supreme Court's harmless error holding in this case, petitioner has assumed the applicability of a relatively permissive mode of harmless error analysis, namely, whether the record as a whole established beyond a reasonable doubt that the jury's verdict would have been the same in the absence of the unconstitutional instruction. But as Justice Scalia has recently pointed out in his concurring opinion in Carella v. California, ___ U.S. ___, 109 S.Ct. 2419, 2424 (1989), the majority opinion in Rose v. Clark, 478 U.S. 570 (1986) can be read to authorize two quite different forms of harmless error analysis in cases involving Sandstrom violations. Under one interpretation of Rose v. Clark, a reviewing court must determine, in order to deem a Sandstrom violation harmless, that the predicate facts which were actually proven beyond a reasonable doubt so conclusively established the presumed fact that the jury may actually be said to have found "'every fact necessary' to establish

every element of the offense beyond a reasonable doubt." Rose v. Clark, supra, 478 U.S. at 580-81. However, as Justice Scalia pointed out in Carella, "[e]lsewhere . . . Rose says that usual harmless-error analysis is applicable: 'Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.' 478 U.S. at 579." 109 S.Ct. at 2424.

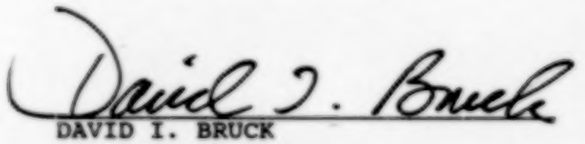
Underlying these two different formulations of the harmless error test are different legal inquiries: the relatively permissive test focuses simply on whether the evidence establisnes the defendant's guilt, while the stricter one requires proof that his guilt was determined by the jury, and not by direction of the trial judge. Compare United States v. Hasting, 461 U.S. 499, 509 (1983) (harmlessness of improper prosecutorial argument must be determined in basis of "the trial record as a whole"), with Connecticut v. Johnson, 460 .S. 73, 87 (1983) (plurality opinion) (conclusive presumption cannot be harmless except in rare situations, such as where presumed element was admitted by defendant). For the reasons set forth above, petitioner submits that the errors in this case cannot be disregarded as harmless under either mode of harmless-error analysis. But in view of the evident ambiguity in this Court's precedents concerning the proper mode of analyzing the prejudicial effect of conclusive or burden-shifting presumptions in criminal cases, petitioner submits that the Court should grant

certiorari to answer that question.

CONCLUSION

For the foregoing reasons, the writ should be granted.

Respectfully submitted,



DAVID I. BRUCK
Attorney at Law

P.O. Box 12249
Columbia, S.C. 29211
(803) 734-1330

ATTORNEY FOR PETITIONER.

May 29, 1990

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

No. 89 -

DALE ROBERT YATES,

Petitioner,

v.

JAMES AIKEN, Warden, Central Correctional Institution, and THE ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents

A P P E N D I X

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Dale Robert Yates,.....Petitioner,

v.

James Aiken, Warden, CCI, and the Attorney General, South Carolina,.....Respondents.

ON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES

Opinion No. 22962

Submitted June 6, 1988 - Filed February 6, 1989

PETITION DENIED

David I. Bruck and John H. Blume, both of Columbia; and S.C. Office of Appellate Defense, of Columbia, for Petitioner.

Attorney General T. Travis Medlock and Chief Deputy Attorney General Donald J. Zelenka, of Columbia, for Respondents.

GREGORY, C.J.: This case is before us on a petition for writ of habeas corpus. We deny the petition.

In 1981 petitioner was convicted of murder, armed robbery, assault and battery with intent to kill, and conspiracy. He was sentenced to death. The convictions and sentence were affirmed on appeal to this Court. State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982), cert. denied, 462 U.S. 1124 (1983).

Petitioner's subsequent application for post-conviction relief was denied by the circuit court in 1984. He then petitioned this Court for review of that denial by way of writ of certiorari. He simultaneously petitioned for habeas corpus relief on the ground the trial judge's charge on implied malice

was improper under state law[1] and under Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

This Court summarily denied the petitions. The United States Supreme Court vacated the denial of the petition for writ of habeas corpus and remanded for reconsideration in light of its decision in Francis v. Franklin. Yates v. Aiken, 474 U.S. 896, 106 S.Ct. 218, 88 L.Ed.2d 218 (1985).

On remand this Court clarified the denial of the petition under state law.[2] Yates v. Aiken, 290 S.C. 232, 349 S.E.2d 84 (1986). Dissatisfied with this Court's disposition under Francis v. Franklin, however, the United States Supreme Court reversed the denial of the petition for habeas corpus. Yates v. Aiken, 484 U.S. ___, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988). It held Francis v. Franklin, which condemns a mandatory presumption regarding proof of an element of the crime, applies retroactively to cases pending on collateral review because it merely reiterates the principles announced in the 1979 decision of Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).[3] This case was again remanded for further proceedings consistent with the Supreme Court's opinion. 98 L.Ed.2d at 554.

Acquiescing in the conclusion that the trial judge's charge on implied malice constituted an improper mandatory presumption, we now address whether the error is harmless beyond a reasonable doubt. We hold it is.

---

[1]Petitioner argued that under State v. Woods, 282 S.C. 18, 316 S.E.2d 673 (1984), he was entitled to retroactive application of our decision in State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), which barred an implied malice charge creating a mandatory rebuttable presumption rather than a permissive inference.

[2]We held retroactive application of Elmore is limited to cases pending on direct appeal at the time Elmore was decided and does not apply to collateral attacks. See McClary v. State, 287 S.C. 160, 337 S.E. 2d 218 (1985).

[3]We note that under this analysis petitioner would not be eligible in federal habeas corpus proceedings to raise the mandatory presumption issue because counsel did not raise this issue under Sandstrom on direct appeal in state court. Reed v. Ross, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984); cf. Franklin v. State, 245 Ga. 141, 263 S.E.2d 666, cert. denied, 447 U.S. 930 (1980) (wherein petitioner in Francis v. Franklin raised mandatory presumption issue under Sandstrom in state court). Of course, we are constrained to accept the high court's mandate that Francis v. Franklin applies here.

In Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986), the United States Supreme Court held jury instructions that violate Francis v. Franklin are subject to a harmless error analysis. The reviewing court must determine whether on the whole record the erroneous mandatory presumption is harmless beyond a reasonable doubt. 92 L.Ed.2d at 474. The pertinent inquiry is whether the evidence is so dispositive of the element subject to the presumption that the reviewing court can say beyond a reasonable doubt the jury would have found it unnecessary to rely on the invalid presumption. Id. Such an inquiry requires us to review the trial judge's charge and the facts of this case in the context of the malice element of the offenses charged.

We restate the facts as set forth in our earlier opinion in this case. Yates and his compatriot Henry Davis spent two days driving around the Greenville area looking for a store to rob. The two finally agreed upon a rural store operated by Willie Wood and entered the store. Yates, armed with a gun, and Davis, brandishing a knife, confronted Wood who was standing behind the store counter. Yates demanded money. Wood hesitated and Davis repeated the demand. Wood gave Davis approximately $3,000 in cash from the cash register. Davis then ordered Wood to lie across the counter. When Wood refused, Yates pointed his gun at Wood. Wood stepped back and raised his hands in a defensive posture. Yates fired. The bullet passed completely through Wood's hand and tore the flesh on Wood's chest.

Alerted by the noise, Wood's mother, Helen Wood, entered the store from a door leading to the adjoining post office. Wood started from behind the counter with his own gun. Davis lunged at Mrs. Wood with his knife. The three struggled together for a few moments before Wood began shooting Davis. Mrs. Wood fell to the floor from knife wounds in her chest and died within moments. Davis died at the scene from gunshot wounds.

After shooting Wood in the chest, Yates took the money from Davis and fled. Yates was not present in the store when Mrs. Wood and Davis were killed but was waiting in the car for Davis to join him.

The State sought petitioner's conviction for the murder of Mrs. Wood on the theory of accomplice liability. Under state law, if two or more parties combine together to commit an unlawful act, and in the commission of that act one party commits a homicide that is a probable or natural consequence thereof, all present participating in the unlawful act are as guilty as the one who committed the homicide. State v. Johnson, 291 S.C. 127, 352 S.E.2d 480 (1987); State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972); State v. Gilbert, 107 S.C. 443, 93 S.E. 125 (1917). The trial judge thoroughly and properly instructed the jury on

tne theory of accomplice liability.[4]

We do not sit as a reviewing court in this case to redetermine factual findings supporting the jury's verdict that petitioner is guilty of murder under a theory of accomplice liability. Contrary to petitioner's assertions in brief, we need not revisit the purported evidence of withdrawal from the commission of the armed robbery, nor must we reexamine the conclusion that Mrs. Wood's murder was a probable or natural consequence of this unlawful act. Our singular inquiry in this case is whether it is beyond a reasonable doubt that the jury would have found it unnecessary to rely on the erroneous mandatory presumption regarding the element of malice. Rose v. Clark, 92 L.Ed.2d at 474.

Our review of the record reveals two erroneous charges regarding implied malice. First, the trial judge charged the jury: "malice is implied or presumed by the law from the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse." Second, he charged: "malice is implied or presumed from the use of a deadly weapon . . . [you are to determine] whether malice existed in the mind and heart of the killer at the time the fatal blow was struck."

Under state law, murder is defined as the killing of any person with malice aforethought, either express or implied. S. C. Code Ann. § 16-3-10 (1985). In the context of accomplice liability for murder, the element of malice which must be proved by the State is that of the killer. We therefore focus on the facts surrounding Henry Davis's brutal multiple stabbing of Mrs. Wood. We find beyond a reasonable doubt the jury would have found it unnecessary to rely on either erroneous mandatory presumption in concluding that Davis acted with malice in killing Mrs. Wood.

The only context in which the element of malice relates to petitioner's individual acts is the offense of assault and battery with intent to kill. This offense is defined under state law as an unlawful act of a violent nature to the person of another with malice aforethought, express or implied. State v. Hinson, 253 S.C. 607, 172 S.E.2d 548 (1970). We find beyond a reasonable doubt the jury would have found it unnecessary to rely on either erroneous mandatory presumption in concluding that petitioner acted with malice when he shot Willie Wood who was in a defenseless position.

---

[4]To accommodate petitioner's defense, the judge further charged that a party is not liable as an accomplice for a murder committed by the slayer as an independent act of private malice, nor is a party liable if he withdraws entirely from the unlawful act before the homicide is committed.

Pursuant to Rose v. Clark and based on our exhaustive review of the record, we hold any error under Francis v. Franklin is harmless beyond a reasonable doubt. The petition for writ of habeas corpus is therefore

DENIED.

HARWELL and CHANDLER, J.J., concur. FINNEY and TOAL, J.J., dissenting in separate opinion.

TOAL, A.J. (dissenting): I respectfully dissent. Although this court has upheld defendant Yates' conviction of murder and armed robbery and sentence of death on three separate occasions, the United States Supreme Court, after denying certiorari on Yates' direct appeal, has, on collateral review, twice reversed our decisions denying Yates' Petition for Writ of Habeas Corpus. We are again required to consider the Petition. I do not believe that the latest decision of the Supreme Court in Yates v. Aiken, 484 U.S. --, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988) allows any further leeway on our part.

Yates and Davis robbed a store in rural Greenville County, near Tigerville in 1981. After Yates obtained the contents of the cash drawer from the proprietor at gunpoint and shot the proprietor in the hand, he fled the store. After Yates had run out of the store, the proprietor's mother then entered the store. Davis stabbed her to death and was shot to death by the proprietor. Yates was convicted of armed robbery and the murder of the proprietor's mother and sentenced to death. Intent or malice aforethought was a key element required to be proved by the State in order to convict Yates of murder. The jury was instructed "that malice is implied or presumed from the use of a deadly weapon." Yates' primary defense was that he was not in the store when the victim entered and did not intend to murder anyone.

In 1979, the Supreme Court held that an instruction which a reasonable juror could understand as mandating as a matter of law that he presume defendant's criminal intent from a given set of circumstances violates the Fourteenth Amendment in that such an instruction improperly shifts the burden of proof from the State to the defendant. Such an instruction, the Supreme Court held, requires the jury to draw conclusions as to defendant's intent from his actions and relieves the State of its burden of proving, and the jury of its burden of finding, intent beyond a reasonable doubt. Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

In 1983, this court held that it was error for a trial judge to instruct a jury in a case that malice is mandatorily presumed from the use of a deadly weapon. State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983). Prior to our decision in Elmore, we had affirmed Yates' conviction on direct appeal [State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982)] and summarily denied his petition for a writ of certiorari.

In 1985, the United States Supreme Court reversed a murder conviction and death penalty sentence in Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), holding that where the accused's only defense is that he did not have the required intent to kill, an instruction that intent is presumed from the use of a deadly weapon is error and cannot be considered harmless.

Shortly thereafter, the United States Supreme Court granted Yates' petition for a writ of certiorari, vacated our judgment and remanded the case to this court for reconsideration in the light of its decision in Francis v. Franklin. See, Yates v. Aiken, 474 U.S. 895, 106 S.Ct. 218, 88 L.Ed.2d 219 (1985).

On remand, this court held that the jury instruction at issue suffered the same infirmities present in State v. Elmore, supra, and Francis v. Franklin. We, however, declined to apply the State v. Elmore standard retroactively. Yates v. Aiken, 290 S.C. 231, 349 S.E.2d 84 (1986). The retroactive application of Francis v. Franklin and the application of Sandstrom v. Montana was not addressed. This court, therefore, denied the petition for a writ of habeas corpus.

In January of this year, the United States Supreme Court, in a unanimous opinion, again considered Mr. Yates' petition for habeas corpus relief in Yates v. Aiken, 484 U.S. --, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988). The Court described its first remand to this court as one "predicated entirely on the fact that petitioner's challenge to the jury instruction asserted a substantial federal question." 108 S.Ct. at 536. The Court then admonished this court for not complying with its mandate: "The portion of the state court's opinion concluding that the instruction in petitioner's case was infirm 'for the reasons addressed in Francis' was responsive to our mandate, but the discussion of the question whether the decision in Elmore should be applied retroactively was not." 108 S.Ct. at 537. Since this court failed to address whether, as a matter of federal law, the petitioner's conviction must stand in light of Francis, the Supreme Court analyzed the issue of the retroactivity of Francis v. Franklin to foreclose any further analysis by this court. The Court held that Francis v. Franklin was merely a reaffirmation of its holding in the 1979 Sandstrom opinion. In so holding, the Court rejected the retroactivity argument advanced by this court in Yates v. Aiken, 290 S.C. 231, 349 S.E.2d 84 (1986).

Without the retroactivity analysis to support this court's denial of the habeas corpus petition, it is my belief that we now are compelled to grant the petitioner a new trial since we previously concluded that the instruction in petitioner's case was constitutionally infirm under Francis v. Franklin. Since we have already considered the constitutional claim on its merits, and found the charge to be violative of Francis, we have "a duty to grant the relief that federal law requires" as instructed by the United States Supreme Court. 108 S.Ct. at 538. The Supreme Court underscored their directive to our court by remanding Yates "for further proceedings not inconsistent with this opinion." 108 S.Ct. at 538.

This mandate from the United States Supreme Court does not, in my view, allow for the harmless error analysis which the majority now employs to deny the habeas corpus petition. Had the Supreme Court desired this court to engage in a harmless error

analysis, I believe the Court would have so indicated in their most recent opinion. Indeed, this court recognized in Yates v. Aiken, 290 S.C. 231, 349 S.E.2d 84 (1986), in a footnote, that a violation of the principles enumerated in Francis v. Franklin was subject to a harmless error analysis. This court, despite the opportunity to do so, chose not to analyze the Franklin issue as harmless. The Supreme Court also refused to consider the harmless error analysis by not seizing on this court's reference to Rose v. Clark, 478 U.S.570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) in Yates v. Aiken, 290 S.C. 231, 349 S.E.2d 84 (1986). Instead, the Court reversed this court's decision for failing to comply with their mandate, that is, to analyze the issue in light of Francis v. Franklin. The directive from the Supreme Court to this court to "grant the relief federal law requires" mandates that we grant the petition for habeas corpus relief.

Even assuming arguendo that the United States Supreme Court's mandate did not preclude this court from analyzing Mr. Yates' claim under Rose v. Clark, then, in my opinion, we are still obliged to afford Mr. Yates a new trial because the erroneous charge which created a mandatory presumption was not harmless beyond a reasonable doubt.

Importantly, Yates' primary defense to the murder charge rested on the contention that he had withdrawn from the criminal enterprise when he left the store before Mrs. Wood entered, prior to Davis' stabbing of Mrs. Wood. Because he had withdrawn, Yates contended that Davis' malicious intent could not be imputed to him under "the hand of one, hand of all" doctrine. Although the judge charged the jury concerning the elements of withdrawal from an enterprise, he also erroneously charged that "malice is implied or presumed from the use of a deadly weapon." The erroneous charge which implied intent from the possession of a deadly weapon countered the charge concerning withdrawal. Given an instruction that malice is presumed from the use of a deadly weapon in light of the fact that both Yates and Davis had deadly weapons, the jury easily could have focused on the deadly weapon Yates carried, a gun, instead of the weapon used by Davis, a knife. Merely possessing a gun, especially one which the jury knew Yates used to shoot Mr. Wood, would have been sufficient for the jury to conclude, by virtue of the erronous instruction, that Yates had the requisite intent to murder. Despite the majority's contention that one must look at the intent of the killer, not that of the accomplice, the judge failed to articulate that the jury must find the killer acted with malicious intent. Thus, the jury could have mistakenly inferred from the confusing instructions that the intent required in order to prove murder was that of Yates because he carried a gun. The unconstitutional instruction which allowed the jury to presume intent, I believe, would have eclipsed Yates' defense of withdrawal, and prejudiced his right to a fair trial. Therefore, the erroneous instruction to the jury was not harmless beyond a reasonable doubt.

I would, therefore, grant the petition for habeas corpus and vacate Yates' conviction, subject to the right of the State of South Carolina to retry Yates within a reasonable period of time. Any other decision on our part simply delays further a retrial, which I believe the United States Supreme Court has mandated.

FINNEY, A.J., concurs.

was improper under state law[1] and under Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

This Court summarily denied the petitions. The United States Supreme Court vacated the denial of the petition for writ of habeas corpus and remanded for reconsideration in light of its decision in Francis v. Franklin. Yates v. Aiken, 474 U.S. 896, 106 S.Ct. 218, 88 L.Ed.2d 218 (1985).

On remand this Court clarified the denial of the petition under state law.[2] Yates v. Aiken, 290 S.C. 232, 349 S.E.2d 84 (1986). Dissatisfied with this Court's disposition under Francis v. Franklin, however, the United States Supreme Court reversed the denial of the petition for habeas corpus. Yates v. Aiken, 484 U.S.___, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988). It held Francis v. Franklin, which condemns a mandatory presumption regarding proof of an element of the crime, applies retroactively to cases pending on collateral review because it merely reiterates the principles announced in the 1979 decision of Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).[3] This case was again remanded for further proceedings consistent with the Supreme Court's opinion. 98 L.Ed.2d at 554.

Acquiescing in the conclusion that the trial judge's charge on implied malice constituted an improper mandatory presumption, we now address whether the error is harmless beyond a reasonable doubt. We hold it is.

---

[1]Petitioner argued that under State v. Woods, 282 S.C. 18, 316 S.E.2d 673 (1984), he was entitled to retroactive application of our decision in State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), which barred an implied malice charge creating a mandatory rebuttable presumption rather than a permissive inference.

[2]We held retroactive application of Elmore is limited to cases pending on direct appeal at the time Elmore was decided and does not apply to collateral attacks. See McClary v. State, 287 S.C. 160, 337 S.E. 2d 218 (1985).

[3]We note that under this analysis petitioner would not be eligible in federal habeas corpus proceedings to raise the mandatory presumption issue because counsel did not raise this issue under Sandstrom on direct appeal in state court. Reed v. Ross, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984); cf. Franklin v. State, 245 Ga. 141, 263 S.E.2d 666, cert. denied, 447 U.S. 930 (1980) (wherein petitioner in Francis v. Franklin raised mandatory presumption issue under Sandstrom in state court). Of course, we are constrained to accept the high court's mandate that Francis v. Franklin applies here.

In Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986), the United States Supreme Court held jury instructions that violate Francis v. Franklin are subject to a harmless error analysis. The reviewing court must determine whether on the whole record the erroneous mandatory presumption is harmless beyond a reasonable doubt. 92 L.Ed.2d at 474. The pertinent inquiry is whether the evidence is so dispositive of the element subject to the presumption that the reviewing court can say beyond a reasonable doubt the jury would have found it unnecessary to rely on the invalid presumption. Id. Such an inquiry requires us to review the trial judge's charge and the facts of this case in the context of the malice element of the offenses charged.

We restate the facts as set forth in our earlier opinion in this case. Yates and his compatriot Henry Davis spent two days driving around the Greenville area looking for a store to rob. The two finally agreed upon a rural store operated by Willie Wood and entered the store. Yates, armed with a gun, and Davis, brandishing a knife, confronted Wood who was standing behind the store counter. Yates demanded money. Wood hesitated and Davis repeated the demand. Wood gave Davis approximately $3,000 in cash from the cash register. Davis then ordered Wood to lie across the counter. When Wood refused, Yates pointed his gun at Wood. Wood stepped back and raised his hands in a defensive posture. Yates fired. The bullet passed completely through Wood's hand and tore the flesh on Wood's chest.

Alerted by the noise, Wood's mother, Helen Wood, entered the store from a door leading to the adjoining post office. Wood started from behind the counter with his own gun. Davis lunged at Mrs. Wood with his knife. The three struggled together for a few moments before Wood began shooting Davis. Mrs. Wood fell to the floor from knife wounds in her chest and died within moments. Davis died at the scene from gunshot wounds.

After shooting Wood in the chest, Yates took the money from Davis and fled. Yates was not present in the store when Mrs. Wood and Davis were killed but was waiting in the car for Davis to join him.

The State sought petitioner's conviction for the murder of Mrs. Wood on the theory of accomplice liability. Under state law, if two or more parties combine together to commit an unlawful act, and in the commission of that act one party commits a homicide that is a probable or natural consequence thereof, all present participating in the unlawful act are as guilty as the one who committed the homicide. State v. Johnson, 291 S.C. 127, 352 S.E.2d 480 (1987); State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972); State v. Gilbert, 107 S.C. 443, 93 S.E. 125 (1917). The trial judge thoroughly and properly instructed the jury on

the theory of accomplice liability. To accommodate petitioner's defense, the judge further charged that a party is not liable as an accomplice for a murder committed by the slayer as an independent act of private malice, nor is a party liable if he withdraws entirely from the unlawful act before the homicide is committed.

We do not sit as a reviewing court in this case to redetermine factual findings supporting the jury's verdict that petitioner is guilty of murder under a theory of accomplice liability. Contrary to petitioner's assertions in brief, we need not revisit the purported evidence of withdrawal from the commission of the armed robbery, nor must we reexamine the conclusion that Mrs. Wood's murder was a probable or natural consequence of this unlawful act. Our singular inquiry in this case is whether it is beyond a reasonable doubt that the jury would have found it unnecessary to rely on the erroneous mandatory presumption regarding the element of malice. Rose v. Clark, 92 L.Ed.2d at 474.

Our review of the record reveals two erroneous charges regarding implied malice. First, the trial judge charged the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse." Second, he charged: "malice is implied or presumed from the use of a deadly weapon. . . [you are to determine] whether malice existed in the mind and heart of the killer at the time the fatal blow was struck."

Under state law, murder is defined as the killing of any person with malice aforethought, either express or implied. S. C. Code Ann. § 16-3-10 (1985). On the facts of this case, as charged by the trial judge, the element of malice relied on by the State is that of the killer, Henry Davis. We therefore focus on the facts surrounding Henry Davis's brutal multiple stabbing of Mrs. Wood. We find beyond a reasonable doubt the jury would have found it unnecessary to rely on either erroneous mandatory presumption in concluding that Davis acted with malice in killing Mrs. Wood.

The only context in which the element of malice relates to petitioner's individual acts is the offense of assault and battery with intent to kill. This offense is defined under state law as an unlawful act of a violent nature to the person of another with malice aforethought, express or implied. State v. Hinson, 253 S.C. 607, 172 S.E.2d 548 (1970). We find beyond a reasonable doubt the jury would have found it unnecessary to rely on either erroneous mandatory presumption in concluding that petitioner acted with malice when he shot Willie Wood who was in a defenseless position.

Pursuant to Rose v. Clark and based on our exhaustive review of the record, we hold any error under Francis v. Franklin is harmless beyond a reasonable doubt. The petition for writ of habeas corpus is therefore

DENIED.

HARWELL and CHANDLER, J.J., concur. FINNEY and TOAL, J.J., dissenting in separate opinion.

TOAL, A.J. (dissenting): I respectfully dissent. Although this court has upheld defendant Yates' conviction of murder and armed robbery and sentence of death on three separate occasions, the United States Supreme Court, after denying certiorari on Yates' direct appeal, has, on collateral review, twice reversed our decisions denying Yates' Petition for Writ of Habeas Corpus. We are again required to consider the Petition. I do not believe that the latest decision of the Supreme Court in Yates v. Aiken, 484 U.S. --, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988) allows any further leeway on our part.

Yates and Davis robbed a store in rural Greenville County, near Tigerville in 1981. After Yates obtained the contents of the cash drawer from the proprietor at gunpoint and shot the proprietor in the hand, he fled the store. After Yates had run out of the store, the proprietor's mother then entered the store. Davis stabbed her to death and was shot to death by the proprietor. Yates was convicted of armed robbery and the murder of the proprietor's mother and sentenced to death. Intent or malice aforethought was a key element required to be proved by the State in order to convict Yates of murder. The jury was instructed "that malice is implied or presumed from the use of a deadly weapon." Yates' primary defense was that he was not in the store when the victim entered and did not intend to murder anyone.

In 1979, the Supreme Court held that an instruction which a reasonable juror could understand as mandating as a matter of law that he presume defendant's criminal intent from a given set of circumstances violates the Fourteenth Amendment in that such an instruction improperly shifts the burden of proof from the State to the defendant. Such an instruction, the Supreme Court held, requires the jury to draw conclusions as to defendant's intent from his actions and relieves the State of its burden of proving, and the jury of its burden of finding, intent beyond a reasonable doubt. Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

In 1983, this court held that it was error for a trial judge to instruct a jury in a case that malice is mandatorily presumed from the use of a deadly weapon. State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983). Prior to our decision in Elmore, we had affirmed Yates' conviction on direct appeal [State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982)] and summarily denied his petition for a writ of certiorari.

In 1985, the United States Supreme Court reversed a murder conviction and death penalty sentence in Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), holding that where the accused's only defense is that he did not have the required intent to kill, an instruction that intent is presumed from the use of a deadly weapon is error and cannot be considered harmless.

Shortly thereafter, the United States Supreme Court granted Yates' petition for a writ of certiorari, vacated our judgment and remanded the case to this court for reconsideration in the light of its decision in Francis v. Franklin. See, Yates v. Aiken, 474 U.S. 895, 106 S.Ct. 218, 88 L.Ed.2d 219 (1985).

On remand, this court held that the jury instruction at issue suffered the same infirmities present in State v. Elmore, supra, and Francis v. Franklin. We, however, declined to apply the State v. Elmore standard retroactively. Yates v. Aiken, 290 S.C. 231, 349 S.E.2d 84 (1986). The retroactive application of Francis v. Franklin and the application of Sandstrom v. Montana was not addressed. This court, therefore, denied the petition for a writ of habeas corpus.

In January of this year, the United States Supreme Court, in a unanimous opinion, again considered Mr. Yates' petition for habeas corpus relief in Yates v. Aiken, 484 U.S. --, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988). The Court described its first remand to this court as one "predicated entirely on the fact that petitioner's challenge to the jury instruction asserted a substantial federal question." 108 S.Ct. at 536. The Court then admonished this court for not complying with its mandate: "The portion of the state court's opinion concluding that the instruction in petitioner's case was infirm 'for the reasons addressed in Francis' was responsive to our mandate, but the discussion of the question whether the decision in Elmore should be applied retroactively was not." 108 S.Ct. at 537. Since this court failed to address whether, as a matter of federal law, the petitioner's conviction must stand in light of Francis, the Supreme Court analyzed the issue of the retroactivity of Francis v. Franklin to foreclose any further analysis by this court. The Court held that Francis v. Franklin was merely a reaffirmation of its holding in the 1979 Sandstrom opinion. In so holding, the Court rejected the retroactivity argument advanced by this court in Yates v. Aiken, 290 S.C. 231, 349 S.E.2d 84 (1986).

Without the retroactivity analysis to support this court's denial of the habeas corpus petition, it is my belief that we now are compelled to grant the petitioner a new trial since we previously concluded that the instruction in petitioner's case was constitutionally infirm under Francis v. Franklin. Since we have already considered the constitutional claim on its merits, and found the charge to be violative of Francis, we have "a duty to grant the relief that federal law requires" as instructed by the United States Supreme Court. 108 S.Ct. at 538. The Supreme Court underscored their directive to our court by remanding Yates "for further proceedings not inconsistent with this opinion." 108 S.Ct. at 538.

This mandate from the United States Supreme Court does not, in my view, allow for the harmless error analysis which the majority now employs to deny the habeas corpus petition. Had the Supreme Court desired this court to engage in a harmless error

analysis, I believe the Court would have so indicated in their most recent opinion. Indeed, this court recognized in Yates v. Aiken, 290 S.C. 231, 349 S.E.2d 84 (1986), in a footnote, that a violation of the principles enumerated in Francis v. Franklin was subject to a harmless error analysis. This court, despite the opportunity to do so, chose not to analyze the Franklin issue as harmless. The Supreme Court also refused to consider the harmless error analysis by not seizing on this court's reference to Rose v. Clark, 478 U.S.570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) in Yates v. Aiken, 290 S.C. 231, 349 S.E.2d 84 (1986). Instead, the Court reversed this court's decision for failing to comply with their mandate, that is, to analyze the issue in light of Francis v. Franklin. The directive from the Supreme Court to this court to "grant the relief federal law requires" mandates that we grant the petition for habeas corpus relief.

Even assuming arguendo that the United States Supreme Court's mandate did not preclude this court from analyzing Mr. Yates' claim under Rose v. Clark, then, in my opinion, we are still obliged to afford Mr. Yates a new trial because the erroneous charge which created a mandatory presumption was not harmless beyond a reasonable doubt.

Importantly, Yates' primary defense to the murder charge rested on the contention that he had withdrawn from the criminal enterprise when he left the store before Mrs. Wood entered, prior to Davis' stabbing of Mrs. Wood. Because he had withdrawn, Yates contended that Davis' malicious intent could not be imputed to him under "the hand of one, hand of all" doctrine. Although the judge charged the jury concerning the elements of withdrawal from an enterprise, he also erroneously charged that "malice is implied or presumed from the use of a deadly weapon." The erroneous charge which implied intent from the possession of a deadly weapon countered the charge concerning withdrawal. Given an instruction that malice is presumed from the use of a deadly weapon in light of the fact that both Yates and Davis had deadly weapons, the jury easily could have focused on the deadly weapon Yates carried, a gun, instead of the weapon used by Davis, a knife. Merely possessing a gun, especially one which the jury knew Yates used to shoot Mr. Wood, would have been sufficient for the jury to conclude, by virtue of the erroneous instruction, that Yates had the requisite intent to murder. Despite the majority's contention that one must look at the intent of the killer, not that of the accomplice, the judge failed to articulate that the jury must find the killer acted with malicious intent. Thus, the jury could have mistakenly inferred from the confusing instructions that the intent required in order to prove murder was that of Yates because he carried a gun. The unconstitutional instruction which allowed the jury to presume intent, I believe, would have eclipsed Yates' defense of withdrawal, and prejudiced his right to a fair trial. Therefore, the erroneous instruction to the jury was not harmless beyond a reasonable doubt.

I would, therefore, grant the petition for habeas corpus and vacate Yates' conviction, subject to the right of the State of South Carolina to retry Yates within a reasonable period of time. Any other decision on our part simply delays further a retrial, which I believe the United States Supreme Court has mandated.

FINNEY, A.J., concurs.

GREENVILLE COUNTY COURT
OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA

v.

DALE ROBERT YATES

EXCERPTS FROM JUDGE'S CHARGE TO JURY

April 30, 1986

• • • •

[Tr. 1200]

Ladies and gentlemen, a most important rule of evidence that obtains in this state is this: Any defendant who is charged with the commission of any crime and brought into this courtroom to answer for it is presumed by the law to be innocent, and that presumption of innocence would remain with him throughout the trial and even when you go to your jury room, and it would remain with him until the State has proven beyond a reasonable doubt that he is, in fact, guilty of one or more of the charges made against him.

I tell you that that burden of proof by the State and by which you must be convinced is made up or consists solely of the evidence which you have heard from that witness stand or exhibits which have been placed before you and which you will have with you in your jury room and, of course, the law as I explain it to you within the context of which the State must prove this guilt beyond a reasonable doubt. It is from evidence and testimony presented in this courtroom that you must be convinced beyond a reasonable doubt, before the presumption of innocence which clothes him from beginning to end of the trial could fall away from him. That is not merely a

theory that some lawyer thought of, it is a very substantial right that every citizen in South Carolina is entitled to.

I am confident that when you go to your jury room, you will give this Defendant the benefit of the presumption of his innocence.

Ladies and gentlemen, the burden of proving the charges made against this Defendant rests on the State of South Carolina; in this case, Mr. Wilkins, who is the Solicitor here and his assistant, Mr. Traxler, are required by the law, that is, the burden that we are talking about; they are required to present to you evidence, exhibits, by cross-examination of any of the witnesses; they must present before you competent evidence which establishes, beyond a reasonable doubt, the material elements of each of these charges before you could convict the Defendant of any of these charges.

The Defendant does not have to prove that he's innocent. He does not have to disprove that he's guilty. The State must convince you, beyond a reasonable doubt, by evidence presented in this courtroom, of the guilt of the Defendant.

Ladies and gentlemen, reasonable doubt is a phrase that you have all heard, and it means the same thing in the law as it does in ordinary, everyday English language: that is, a doubt for which you have a real reason. However, that excludes fanciful doubts or whimsical doubts, because anyone could doubt any proposition if you wanted to, but reasonable doubt really means a substantial doubt for which an honest person seeking the truth can give a real reason. So, it's to that degree of proof that the State must prove the elements of these charges. When I begin explaining the individual elements to you, bear in mind that it's the State's burden to establish these to you by that degree of proof which I have just defined.

• • • •

[Tr. 1206]

I tell you that a deadly weapon, within the meaning of the law, is any object which can be readily and handily and easily put to use in inflicting personal injury on another person.

Ladies and gentlemen, the State also charges that on February 13th, the Defendant, Dale Yates, committed the crime of murder in Greenville County. Madam Foreman and ladies and gentlemen, murder is the unlawful killing of any human being with malice aforethought, either expressed or implied: that is the definition of murder in South Carolina.

In order to convict one of murder, the State must not only prove the killing of the deceased by the Defendant, but that it was done with malice aforethought, and such proof must be beyond any reasonable doubt. Malice is defined in the law of homicide as a technical term, which imports wickedness and excludes any just cause or excuse for your action. It is something which springs from wickedness, from depravity, from a depraved spirit, from a heart devoid of social duty, and fatally bent on creating mischief. The words "express" or "implied" do not mean different kinds of malice, but they mean different ways in which the only kind of malice known to the law may be shown.

Malice may be expressed as where previous threats of vengeance have been made or is where someone lies in wait for someone else to come by so that they might attack them, or any other circumstances which show directly that an intent to kill was really and actually entertained.

Malice may also be implied as where, although no expressed intention to kill was proved by direct evidence, it is indirectly and necessarily inferred from facts and circumstances which are, themselves, proved. Malice is implied or presumed by the law from the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse. In its general signification, malice means the doing of a wrongful act, intentionally, without justification or excuse.

I tell you, however, that if the facts proven are sufficient to raise a presumption of malice, that presumption is rebuttable, that is, it is not conclusive on you, but it is rebuttable by the rest of the evidence. I tell you, also, that malice is implied or presumed from the use of a deadly weapon. I further tell you that when the circumstances surrounding the use of that deadly weapon have been put in evidence and testified to, the presumption is removed. And it ultimately remains the responsibility for you, ladies and gentlemen, under all the evidence to make a determination as to whether malice existed in the mind and heart of the killer at the time the fatal blow was struck.

There must be malice aforethought. While the law does not require that malice exists for any particular length of time before a commission of an act, it must be aforethought; that is, it must exist for, at least, some time before the commission of the act in question. There must be a combination of previous evil intent and the act which produces the fatal result.

I tell you, however, that the State is not required to prove any motive for a particular killing.

Ladies and gentlemen, another principle of law which applies in this case, depending upon your view of the facts, it is for you to apply the law to the facts as you find them; and the question is whether this law would apply to the facts as you find them to be. If two or more parties combine together to commit an unlawful act, and in the commission of that criminal act, a homicide is committed by one of the parties and the homicide was a probable or natural consequence of the acts done in pursuance of the agreed upon, unlawful act, all present,

participating in the unlawful undertaking, are as guilty as the one who committed the fatal act.

The common purpose may not have been to kill and murder, but if it was unlawful, and in the execution of this unlawful common purpose involves the probable contingency of taking a human life, and during the commission of the unlawful purpose, a life is, in fact, taken, then all present, participating in the unlawful act previously agreed upon, are as guilty as the actual slayer. In this regard, the hand of one is the hand of all.

I charge you that the phrase "in the commission of" means and includes all acts committed by an accused which proximately lead to the accomplishment of the criminal purpose. The commission of a crime begins with the first direct act proximately leading to the accomplishment of the criminal purpose, and the commission of that crime ends when all participants have attained temporary safety from any pursuit.

A defendant is not responsible for a homicide committed by his co-defendant as an independent act growing out of some private malice or ill will which the slayer had toward the deceased, and which is not in furtherance of or connected with the original unlawful purpose, and that is particularly so where the original common design was of such a nature that a homicide would not be a natural or probable result of that unlawful undertaking.

One who is joined in a common design to kill or to commit an unlawful act, the natural and probable consequence of the execution of which involves the contingency of taking human life, may escape responsibility for the homicide committed by a confederate in pursuance of the common design if before the homicide was committed he withdrew entirely from the original criminal undertaking, and the fact of his withdrawal was communicated to his associate under such circumstances as would permit his associate to also withdraw, notwithstanding any attempted withdrawal from the original common purpose. A defendant is responsible for a homicide committed in pursuance of the original design or as a natural or probable consequence of the execution of any unlawful purpose by his associate to whom, prior to the commission of the crime, the fact of his withdrawal had not been communicated; or even if it had been communicated, had not done so under such circumstances as would permit his associate to likewise withdraw from the common purpose. Withdrawal from the scene of the homicide does not establish the fact of withdrawal from the common design with resulting lack of responsibility for a homicide committed by a confederate.

I tell you, however, that withdrawal from the scene of the crime may be considered by you along with the other circumstances in determining whether the Defendant had, in fact, abandoned the common design and in whether the fact of his alleged abandonment of the common purpose had been communicated to his associate.

• • • •